UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNIVERSAL BUILDERS SUPPLY, INC.

Cases 3-CA-27287
and 3-CA-27427

TEAMSTERS LOCAL 445

Alfred Norek, Esq., for the General Counsel.
Scott A. Gold (Schulte Roth & Zabel LLP),
of New York, New York, for the Respondent.
*Jerry Ebert, o*f Newburgh, New York,
for the Charging Party.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This matter arises out of an amended consolidated complaint and notice of hearing issued on December 24, 2009,[1] against Universal Builders Supply, Inc. (the Respondent or UBS), stemming from unfair labor practice (ULP) charges filed by Teamsters Local 445 (the Union). The complaint alleges that UBS violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the Act) by making changes in employees' terms and conditions of employment without having provided the Union with notice and an opportunity to bargain.[2]

Pursuant to notice, I conducted a trial in Albany, New York, on February 25 and March 17, 2010, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

1. Did the Respondent, on about August 3, unilaterally eliminate the established past practice of paying wage supplements, over the rates contained in the collective-bargaining agreement, to employees Robert Coleman, Ricky Klawson, Brandon Marino, Stephen Remenek, Frank Vancil, and Frederick Wind, thereby reducing their pay?

[1] All dates hereinafter occurred in 2009, unless otherwise specified.

[2] The General Counsel does not allege that such conduct constituted retaliation against employees for engaging in an economic strike from July 27–30, following an impasse in negotiations over a new collective-bargaining agreement.

2. Did the Respondent, on about August 3, unilaterally eliminate the established past practice of providing coffee at no cost to unit employees?

Witnesses and Credibility

The General Counsel called Jerry Ebert, the Union's business representative; Robert Shultis, the Union's shop steward; employees Remenek and Vancil; and Kevin O'Callaghan, the Respondent's president and owner, as an adverse witness under Section 611(c). The Respondent called O'Callaghan as its only witness.

Many facts are undisputed. To the extent that there were discrepancies between O'Callaghan's testimony and that of the General Counsel's witnesses, I credit the latter, who were for the most part quite consistent and credible, taking into account natural and expected variations in recall. I note that discrepancies between Ebert's testimony and his affidavit were related to minor errors in dates and numbers and did not go to any substantive matters on which his testimony differed from O'Callaghan's. I reach the same conclusion with regard to the one inconsistency between the testimony of Ebert and Shultis: whether Ebert showed Shultis any of his e-mail negotiations with O'Callaghan.

Moreover, I cannot draw any adverse inferences against Ebert's credibility by virtue of his representations that he could not attend the February 25 hearing because of an automobile accident or come the next day because of severe winter weather in the Newburgh, New York, area. The Respondent has not suggested any reason why Ebert's nonattendance, with a resulting delay in the conclusion of proceedings, would have benefited the Union in any way

In contrast, I find O'Callaghan's testimony seriously flawed on critical subjects. I base this on my observations of O'Callaghan's demeanor (he was markedly defensive and appeared ill at ease), the frequent vagueness and nonresponsiveness of his testimony, internal inconsistencies in his accounts, and the implausibility of some of his assertions.

Thus, O'Callaghan was vague on why certain employees prior to July were paid over the wage rate contained in the collective-bargaining agreement. He was vague and contradictory as to when he purportedly told Ebert that some employees were receiving these wage supplements. On 611(c) examination on the first day of trial, he testified that, in a phone conversation with Ebert during the July strike, he made a passing comment on the subject. However, on direct examination on the second day, he expanded the number of such conversations to three but was very vague and evasive when questioned about his exact words.

This was particularly glaring concerning his testimony that on or before July 30, during the course of negotiations for a new agreement, he told Ebert "along [the] lines" that employees' pay supplements would be eliminated.[3] When I tried to get him to be more focused and specific in his answer of when he first told Ebert there would be a

[3] Tr. 242.

change in the wage supplement, he offered the rather preposterous explanation, "I don't recall because I don't recall it being a necessary conversation."[4] It is undisputed that the primary issues during bargaining concerned employees' economic benefits, and the only reasonable conclusion is that both O'Callaghan and Ebert would have considered extremely significant any statements O'Callaghan made about cutting pay. This conclusion is especially warranted when the alleged statements about pay reductions took place in the context of trying to reach agreement on a new contract and end the strike.

I further find wholly unbelievable O'Callaghan's testimony that when he purportedly told Ebert that he would be taking away the wage supplements, Ebert did not respond.[5] This testimony on its face is implausible in the extreme. Moreover, it is indirectly contradicted by e-mail correspondence between Ebert and O'Callaghan, starting in August, expressing Ebert's rage over the pay reduction. Ebert's August 20 e-mail labeled it "one of the dirtiest tricks I've seen in 30 years" and stated, "Don't try to sugar-coat it, or play me and the workers for gullible upstate suckers. Until that matter is settled (along with the coffee trick), we are at total war."[6] Even before the strike, Ebert evinced marked displeasure that employees would not be receiving pay increases,[7] convincing me that he would have vociferously objected if O'Callaghan had even hinted that any of them would suffer pay cuts when they returned to work.

In making my credibility assessment in favor of the General Counsel's witnesses over O'Callaghan, I take note that the Respondent did not call Plant Manager Jacques Donovan, even though he attended negotiations along with O'Callagahn and was the company representative most involved with the employees who received pay supplements. In this respect, O'Callaghan, whose office is in New Rochelle, New York, testified that he visits the facility only about four times annually and that Donovan is in charge of its day-to-day operations. An adverse inference properly may be drawn when a party fails to call as a witness one of its agents who could reasonably be expected to corroborate its version of events. See, e.g., *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 n. 1 (1977).

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, as well as the thoughtful posttrial briefs that the General Counsel and the Respondent filed, I find the following.

The Respondent, a corporation with an office and principal place of business in

---

[4] Tr. 247. See also Tr. 248, wherein O'Callaghan answered "I don't know" to my question of whether July 30 was the first time he said anything to Ebert about taking away wage supplements.

[5] Tr. 242.

[6] GC Exh. 11 at 1.

[7] E.g., his July 22 e-mail to O'Callaghan. GC Exh. 14 at 1.

New Rochelle, New York, and a place of business in Red Hook, New York (the facility), has been engaged in the design, construction, erection, and dismantling of scaffolding and related products. The Respondent has admitted jurisdiction as alleged in the complaint, and I so find.

For many years, the Union has been the designated collective-bargaining representative of all production and maintenance employees, forklift operators, machine operators, welders, shipping and receiving clerks, laborers, and plant workers at the facility. The number of unit employees is around 20. Plant Manager Donovan and his assistant handle the facility's day-to-day operations.

The Respondent and the Union were parties to a collective-bargaining agreement effective July 1, 2006 through June 30, 2009.[8] Article 28, wages, provided for 25 cents an hour increases effective July 1, 2007, and July 1, 2008.[9] Further, new hires received percentages of these wages during their first three years of employment. Finally, the employee designated as working yard foreman received an additional 15 cents an hour. The contract contained nothing about employees receiving any kind of pay supplements over the listed contractual rates or about UBS furnishing them coffee for free.

On June 30, O'Callaghan and then Union Business Representative Ernest Romero signed a 15-day extension of the contract, expiring on July 14.[10] Subsequent negotiations resulted in an impasse, and the employees went out on an economic strike on July 27.

Practices Prior to July 27

Wage Supplements

Prior to the strike, UBS was paying six employee higher hourly wages than those specified in the contract. O'Callaghan testified that management made the decision to give additional pay to these employees on a case-by-case basis; to recognize their workload or responsibilities, or to provide them with training or incentives. Again, the Respondent did not call Donovan as a witness, and I credit the uncontroverted testimony of Remenek and Vancil, as follows.

Remenek has been a UBS employee for over 22 years. He first received a wage supplement about 3-1/2 years ago. At the time, he was designated a lead welder and was performing some of the duties of a supervisor who had a terminal illness, but management did not provide him with any reasons for conferral of the increase.

Vancil's job duties as a mechanic have remained substantially the same since his hiring over seven years ago. He first received a wage supplement three or four years

[8] GC Exh. 2.
[9] Ibid at 12.
[10] GC Exh. 3.

ago, to $18/hour, and a further increase about a year ago, to $22/hour. Prior to both increases, he "kept bugging" Donovan to give him a raise because he believed he deserved more.

There is no evidence that the Union was ever notified in advance that any employees would be receiving such supplemental pay or that the Union had notice prior to July 28 that employees were receiving such. In O'Callaghan's July 28 e-mail to Ebert, in the context of negotiations, he made the statement,"(Do you know that at least four [employees] had been getting paid over scale (approx. 25% of the workforce?)."[11] Ebert testified that he did not inquire further because the Union has a policy of not challenging extra pay, for fear that it would turn employees against the Union and also for a tactical advantage in future negotiations. He also testified that he did not want to complicate ongoing negotiations.

Free Coffee

Employees have two 10-minute breaks, at 9:30 a.m. and 2 p.m., and a lunch break from 12–12:30 p.m. For at least 10 or 12 years prior to the strike, UBS had a practice of using an outside vendor to furnish free coffee and coffee supplies to all employees, without a limitation on how many cups they could have. The three employees who testified (Remenek, Shultis, and Vancil) each drank between two and eight cups daily. One coffee machine was in the area where rock and pinion employees took their breaks; the other was where fabrication employees took breaks.

Negotiations and Strike

The parties held four negotiations' meetings at the facility, on July 13, 20, 23, and 30. O'Callaghan and Donovan represented UBS. Ebert, who had taken over from Romero as Business Representative during the two-week extension of the 2006–2009 contract, was the Union's chief negotiator at all of the meetings. Shop steward Shultis and employees Coleman and Marino also attended all of them. At subsequent meetings, employees in general attended. In addition, O'Callaghan and Ebert negotiated in several telephone calls and by e-mail.

During negotiations, a major issue for the Union was increased employer contributions toward medical benefits, so that employees could have dental and optical care restored. Ebert stated that the employees were willing to forego raises if they received such increases. Other than the statement in O'Callaghan's July 28 e-mail, cited earlier, nothing was said at any of these meetings or in other communications about employees receiving higher wage rates than the contractual wage rates, or concerning the Respondent's practice of providing free coffee.[12] In one of the later meetings, O'Callaghan presented the Union with a list of five options, proposing that the Union, in exchange for increased health benefits contributions, agree to reductions in

[11] GC Exh. 22 at 2.

[12] I credit Ebert's testimony, and find that O'Callaghan never stated at any time during negotiations that Respondent would be eliminating employees' supplemental pay.

various other benefits.[13] It mentioned nothing about eliminating or reducing wage supplements or about taking away free coffee.

The parties reached an impasse in negotiations, and the Union commenced an economic strike on July 27. On the afternoon of July 30, Ebert called O'Callaghan, and they discussed resolution of their differences over the terms of the new contract. O'Callaghan agreed to withdraw the Respondent's request to eliminate seniority and also agreed to an additional four hours of sick leave. Ebert agreed to a modification of the Respondent's payment of increased medical benefits. The Union had proposed $1 the first year and additional dollars each of the following two years but agreed to $.75 the first year, $.75 the second year, and $1.50 the last year. The Union further agreed to the Respondent's proposals to eliminate pay for a floating holiday and paid jury duty leave, new hires paying a medical benefits copayment of 10 percent (existing employees paid none), and lengthening the probationary period for new employees from 60 days to six months.

Immediately after the call, Ebert went to the employees on the picket line and advised them of his tentative verbal agreement with O'Callaghan. They took his recommendation to vote in favor of ratification and to end the strike. Ebert immediately informed O'Callaghan by telephone. Ebert and O'Callaghan agreed that since the following day was a Friday, employees would return to work on Monday, August 3.

On August 14 and 21, respectively, Ebert and Donovan signed the new agreement, effective from July 31, 2009 through June 30, 2012 (the agreement).[14] Article 8 Section A, grievance and arbitration procedures, defines a grievance as "any controversy, complaint, misunderstanding or dispute." Section B states, "The arbitrator shall not have the authority to amend or modify this Agreement or establish new terms conditions [sic] under this Agreement." The contract contains no management rights provision. Article 37 provides that during the term of the contract, "neither party hereto may reopen this Agreement for negotiations on any issues, either economic or non-economic" (a "zipper-clause").

Changes Following the Strike

Providing Coffee

On Sunday, August 2, Ebert received information from a driver that UBS had removed the coffee machine and free coffee. He sent O'Callaghan an e-mail that evening, asking the Company to confirm that it was not true ("[Y[ou guys don't seem capable of such a small-minded tactic that would undoubtedly backfire with crap morale, anger, and an unfair labor practice charge from the union . . . .)."[15]

Employees returned to work on Monday, August 3. They notified Ebert that day

[13] GC Exh. 15.
[14] GC Exh. 4.
[15] GC Exh. 8.

that the coffee was, in fact, gone. That evening, he sent O'Callaghan an e-mail, protesting the Respondent's action and saying that the Union would be filing a ULP charge ("In every workforce there are some who are convinced the company would just as soon crap on them. You proved them right.").[16] O'Callaghan never responded to either e-mail.

The Respondent admittedly stopped providing free coffee to employees during the strike and concedes that it did so without providing the Union notice and an opportunity to bargain. Since then, employees have had to provide and pay for their own coffee.

Paying Wage Supplements

Upon the employees' return from the strike, the six who had been receiving wage supplements no longer received them. Instead, they were paid the rates specified in the collective-bargaining agreement. The Respondent has continued to date to pay them the contractual rates.

Ebert first learned of this on about August 13, when Shultis informed him that several employees who had received wage supplements before the strike reported them eliminated on their first paychecks after returning.[17] By e-mail of August 14, Ebert advised O'Callaghan that the signed contract was in the mail and also that the Union was filing charges concerning removal of the coffee and elimination of the extra pay for several employees.[18] By e-mail of August 20, Ebert objected to the wage change in very strong terms, characterizing it as "one of the dirtiest tricks I've seen in 30 years."[19]

By October 7 e-mail, Ebert made a formal request for payroll records for the period January 1, 2008 through October 10, 2009, showing wage rates on a weekly basis.[20] On October 22, UBS provided the information as an e-mail attachment.[21]

General Counsel's Exhibit 5 reflects the following pay rates for the selected employees for the last pay period before the strike (through July 26) and for the first pay period after the strike (ending August 9), and the classifications in the contract to which the latter correspond:

Vancil	$22.00	$17.19	(welder/machinist, fabricator)
Marino	21.34	16.63	(forklift plus working foreman differential)
Coleman	20.25	19.60	(electrician)
Remenek	19.69	17.69	(Lead welder).

[16] GC Exh. 9.

[17] Based on this factual finding, I conclude that the Union never waived any rights to bargain on the subject, contrary to Respondent's contention (R. Br. 8–9).

[18] GC Exh. 19.

[19] GC Exh. 11.

[20] GC Exh. 21 at 2.

[21] GC Exh. 6.

Wind	17.34	17.19	(welder/machinist, fabricator)
Klawson	17.34	17.19	"

The Union did not file grievances over the elimination of wage supplements or of the free coffee because Ebert concluded they were not subjects mentioned in the collective-bargaining agreement.

Analysis and Conclusions

Deferral

The Respondent, both in its answer and its brief, has urged deferral to the parties' grievance and arbitration procedure under *Collyer Insulated Wire*, 192 NLRB 837 (1971) and its progeny. The Respondent therefore timely raised deferral as an affirmative defense.

Under *Collyer* and *United Technologies Corp.*, 268 NLRB 557 (1984), deferral is appropriate when the following factors are present: the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution. *Wonder Bread*, 343 NLRB 55, 55 (2004), citing *United Technologies*, above, at 558.

Although Article 8 Section A of the agreement has an open-ended definition of grievance ("any controversy, complaint, misunderstanding or dispute"), Section B goes on to state that an arbitrator has no authority to amend or modify the agreement or to establish new terms and conditions in it. There is no management rights clause or language on which the Respondent arguably can rely to justify its actions. The parties' agreement mentions nothing about the Respondent conferring increased wages solely at its own discretion and without any notification to the Union, or about the Respondent providing free coffee to employees. In fact, those topics appear nowhere in the agreement. Nor does anything in the record show or even suggest that these subjects were ever discussed with the Union in the context of collective-bargaining agreements, or otherwise. They were essentially the Respondent's sole creations and devoid of any contractual nexus, and I therefore fail to see how an arbitrator could reasonably decide the parties' dispute based on contract interpretation.

In sum, the arbitration clause of the agreement neither unequivocally confers jurisdiction on an arbitrator to decide the instant matters nor clearly encompasses the subjects in dispute. In light of these considerations, I further conclude that the issues presented are not eminently well suited to resolution through arbitration but hinge on whether or not the Statute was violated—a determination properly left to the Board. See *University Moving & Storage Co.*, 350 NLRB 6, 20–21 (2007) (no controversy regarding the meaning of contractual provisions); *U.S. Steel Corp.*, 223 NLRB 1246, 1247 (1976) (nothing in contract on matter at issue). Accordingly, I determine deferral is

inappropriate in the circumstances of this case and will proceed to address the merits of the ULP charges.

Waiver

The Respondent argues (Br. at 8–12) that since the Union knew about the elimination of wage supplements and coffee at the time Ebert signed the new agreement, the zipper clause language in Article 37 should be held to constitute a waiver of any union right to bargain over these subjects.

In order to conclude that the Union waived such a right, the Respondent must establish that the Union's conduct constituted a "clear and unmistakable" waiver. See, e.g., *American Benefit Corp.*, 354 NLRB No. 129 slip op. at 1 fn. 4 (2010); *Provena St. Joseph Medical Center*, 350 NLRB 808, 809 et seq. (2007), in which the Board stated (at 811):

> The clear and unmistakable waiver, then, requires bargaining partners to unequivocally and specifically request their mutual intention to permit unilateral employer action with respect to a particular employment item, notwithstanding the statutory duty to bargain that would otherwise apply. The standard reflects the Board's policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes.

Article 37 states that neither party may "reopen this Agreement for negotiations on any issues, either economic or non-economic." The provision is therefore ambiguous on its face as far as covering matters outside the scope of the contract (i.e., wage supplements and coffee). Neither this provision nor anything else in the contract specifically addresses terms and conditions of employment not contained in the agreement. In these circumstances, I cannot conclude that by signing the contract with knowledge that the Respondent had ceased paying wage supplements and supplying free coffee, Ebert "clearly and unmistakably" waived the Union's right to bargain over them. I note that Ebert first learned of the changes (from employees) after the parties had orally agreed to the terms of a new contract, as a result of which the Union called off its economic strike. I cannot reasonably conclude that Ebert should have been required to hold off signing the contract until bargaining took place on the changes. This would have carried the twin risks of jeopardizing the entire agreement and of causing a resumption of the strike. Such a determination would run contrary to the Act's fundamental purpose of promoting labor peace.

The cases that the Respondent cites (Br. at 9) do not dictate a contrary result. In *Radioear Corp.*, 214 NLRB 362, 364 (1974), the employer had an established past practice of conferring Thanksgiving and Christmas bonuses. The subjects were not discussed during negotiations on a first contract and not mentioned therein. After the contract went into effect, the employer discontinued said bonuses. The Board held that the Union had waived the right to bargain over them by virtue of the following zipper-clause language in the agreement:

> It is acknowledged that during negotiations which resulted in this agreement, the Union had the unlimited right and opportunity to make demands and proposals

> with respect to all proper subjects of collective bargaining. Therefore, for the life of this agreement, the Union agrees that the Company shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this agreement.

Thus, as opposed to the language in Article 37, the contractual language specifically included subjects not contained in the agreement. The language in the contract in *TCI of New York*, 301 NLRB 822, 825–826 (1991), was also distinguishable from that here. The Board therein relied on a provision that the contract "superse[d] all prior agreements, understandings, and past practices, oral or written, express or implied," in finding that the Union waived its right to bargain over discontinuance of the past practice of paying bonuses.

Accordingly, I conclude that the Union did not waive any of its rights to bargain over either elimination of the wage supplements or of free coffee.

The Wage Supplements and Free Coffee as Mandatory Subjects of Bargaining.

An employer is required to bargain with its employees' collective-bargaining representative over wages, hours, and other terms and conditions of employment that are "plainly germane" to 'the working environment'"—mandatory subjects of bargaining—as opposed to those that relate to managerial decisions of an entrepreneurial nature. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). Accordingly, an employer may not unilaterally change employees' wages, hours, and other terms and conditions of employment without first affording their collective-bargaining representative timely notice and a meaningful opportunity to bargain over any proposed changes. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Cook Dupage Transportation Co.*, 354 NLRB No. 31, slip op. 10 (2009).

This bargaining obligation extends to an employer's regular and longstanding practices concerning wages, hours, and other terms and conditions of employment, even if not required by a collective-bargaining agreement. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); see also *Coastal International Security, Inc.*, 352 NLRB 289, 294 (2008). Inasmuch as the Respondent admits it has for years consistently paid wage supplements and provided employees free coffee, the General Counsel has met its burden of showing they were regular and longstanding practices. See *Regency Heritage Nursing & Rehabilitation Center*, 353 NLRB No. 103, slip op. 2 (2009); *Sunoco, Inc.*, ibid.

Wage Supplements

Wage payments are clearly a mandatory subject of bargaining which an employer is not privileged to unilaterally change. *NLRB v. Katz*, above; *Mission Foods*, 350 NLRB 336, 337 (2007).

The Respondent cites (Br. at 7–8) *KFMB Stations*, 349 NLRB 373, 375 (2007), for the propositions that granting over-scale wages is a permissive subject of bargaining

and that an employer can unilaterally rescind permissive terms of the contract at any time. However, that case more precisely held that a contractual provision permitting the employer to negotiate over-scale wage payments directly with employees was a permissive subject of bargaining over which neither party could bargain to impasse. A two-Member majority held that in such circumstances, the respondent lawfully reduced an employee's wages to union scale at the expiration of their "contract" for enhanced pay. In contrast, the present case involves a situation in which the Union never agreed to permit the Respondent to bargain directly with employees over their wages or any other contractual matter.

The Respondent also argues (Br. at 7) that because the Union did not know about the wage supplements, they were not an implied term and condition of employment since there was no mutual consent. However, the wage supplements here were not a term and condition of employment implied from any agreement of the parties; rather, the Respondent unilaterally conferred and then unilaterally eliminated them. To hold that the Union should not now be able to seek a remedy for what amounted to a pay reduction would lead to the untenable result of rewarding the Respondent for not having notified the Union of its unilateral conduct in the first place.

Based on the above analysis, I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by discontinuing wage supplements on August 3.

Free Coffee

With the prevalence of coffee drinking in our society, both at and off the workplace, coffee in the broader sense can be considered in popular culture as a food source. In *Ford Motor Co. v. NLRB*, above at 498, the Supreme Court held that "[t]he terms and conditions under which food is available on the job are plainly germane to the 'working environment,'" citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222 (1964), and as such require bargaining.

Even taking a narrower approach and treating coffee on its own, and not under the rubric of food, the Board has specifically found that an employer's practice of providing free coffee on a daily basis rises to the level of a benefit that constitutes a mandatory subject of bargaining and therefore cannot be unilaterally eliminated. *Beverly Enterprises*, 310 NLRB 222, 239 (1993), enfd. in relevant part, 17 F.3d 580 (2nd Cir. 1994); *E. I. du Pont de Nemours & Co.*, 311 NLRB 893, 898 fn. 12 (1993). Moreover, the Board has found that employers made an unlawful unilateral change when they replaced free coffee with coffee vending machines. *Central Mack Sales*, 273 NLRB 1268, 1289 (1984); *Missourian Public Co.*, 216 NLRB 175, 175 (1975) (reversing ALJ's recommended dismissal of the allegation). See also *Poletti's Restaurant*, 261 NLRB 313, 320 fn. 16 (1982) (cessation of providing free desserts); *Southern Florida Hotel & Motel Ass'n*, 245 NLRB 561, 569 (1979) (cessation of providing two free beers or soft drinks daily).

The Respondent cites (Br. at 10) *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978) for the proposition that elimination of free coffee service does not amount to a material, substantial, and significant change. However, in a later decision, *Wisconsin*

Steel Industries, 321 NLRB 1394, 1394 (1996), the Board adopted Judge Stephen Gross' determination that elimination of free coffee and donuts on paydays (once weekly) was a violation.[22] In any event, the clear weight of authority, cited above, runs contrary to *Weather Tec*, as does the reality of the widespread importance of coffee drinking in the workplace.

Accordingly, the Respondent violated Section 8(a)(5) and (1) of the Act when, on August 3, it stopped providing unit employees with free coffee service.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By eliminating wage supplements and free coffee without first providing the Union timely notice and an opportunity to meaningfully bargain, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

Remedy

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Board stated in *Essex Valley Vesting Nurses Ass'n*, 343 NLRB 817, 821 (2004), that the standard remedy in unilateral change cases includes ordering the employer to: 1) bargain over the change; 2) rescind the change, pending bargaining; and 3) make employees whole for any loss of earnings or other benefits they suffered as a result of the unlawful change, in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Specifically regarding this remedy for eliminating free coffee service, see *Missourian Publishing Co.*, 216 NLRB 175, 175 (1975).

My order will include these remedies.

ORDER

The Respondent, Universal Builders Supply, Inc., Red Hook, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

[22] Judge Gross noted the holding in *Weather Tec* but chose not to apply it. See 318 NLRB 212, 224 (1995).

(a) Changing the established past practices of paying wage supplements and providing free coffee to employees without first timely notifying the Union and affording it a meaningful opportunity to bargain.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain with the Union, on request, over any changes in paying wage supplements or providing free coffee.

(b) Restore its established past practice of paying wage supplements to Ricky Clawson, Robert Coleman, Brandon Marino, Stephen Remenek, Frank Vancil, and Frederick Wind, pending the outcome of bargaining.

(c) Make whole, with interest, said employee for any loss of pay they may have suffered as a result of the unlawful elimination of their wage supplements, as set forth in the Remedy section above.

(d) Restore its established past practice of providing free coffee to unit employees, pending the outcome of bargaining.

(e) Make unit employees whole, with interest, for any expenses they have incurred as result of the unlawful cessation of the practice of providing free coffee to employees, as set forth in the Remedy section above.

(f) Within 14 days after service by the Region, post at its facility at Red Hook, New York, copies of the attached notice marked "Appendix.":[23] Copies of the notice, on forms provided by the Regional Director for Region 3 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 3, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. May 4, 2010

_____
IRA SANDRON
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

Teamsters Local 445 is the certified bargaining representative of our production and maintenance employees, forklift operators, machine operators, welders, shipping and receiving clerks, laborers, and plant workers.

WE WILL NOT change any established past practices, including payment of wage supplements and providing you with free coffee, without timely notifying the Union and affording it a meaningful opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights that Federal law guarantees you.

WE WILL bargain with the Union, on request, on any changes we wish to make regarding the payment of wage supplements or providing free coffee to employees.

WE WILL restore our established past practice of paying wage supplements to Ricky Clawson, Robert Coleman, Brandon Marino, Stephen Remenek, Frank Vancil, and Frederick Wind, pending the outcome of bargaining.

WE WILL make said employees whole, with interest, for any loss of pay they may have suffered as a result of the unlawful elimination of their wage supplements.

WE WILL restore our established past practice of providing free coffee to unit employees, pending the outcome of bargaining.

WE WILL make unit employees whole, with interest, for any expenses they have incurred as result of our unlawful elimination of free coffee.

UNIVERSAL BUILDERS SUPPLY, INC.

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901

Buffalo, New York 14202-2387

Hours: 8:30 a.m. to 5 p.m.

716-551-4931.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.